No. 3815

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

JOHN LARSON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

HELLENTHAL & HELLENTHAL,
Attorneys for the Plaintiff in Error.

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Statement of Facts.

This action was brought by the defendant in error against the plaintiff in error to recover damages to property occasioned by landslide alleged to have been caused by the negligence of plaintiff in error.

Defendant in error claimed to have been the owner of a house and certain articles of personal property situated thereon, which he claimed was destroyed by landslide caused by water escaping from diverting works of the plaintiff in error maintained on the mountainside above the mass which slid and caused the injury.

The plaintiff in error denied all the allegations in the complaint and claimed that the landslide referred to in the complaint was brought about as the result of an excavation made in the toe of the mass that slid, by one Koski, which took away the lateral support of the mass, and by rain and melting snow, which made the mass heavy and slippery.

The plaintiff in error also denied all the allegations of the complaint relating to the injury and damage. Before the case went to the jury, that portion of the defendant in error's claim relating to the real property was withdrawn and expressly waived so that the only part of the claim submitted to the jury related to injury done, if any, to the personal property referred to in the complaint as the "Bill of Particulars".

The jury found the verdict for the defendant in error upon which judgment was entered. To reverse this judgment, this writ of error was sued out.

The bill of exceptions contains all the evidence adduced at the trial, which proved or tended to prove the injuries complained of or the damages sustained and all the evidence which proved or tended to prove the value of the property alleged to have been either injured or destroyed, but does not contain the evidence relating to other issues raised by the pleadings and submitted to the jury.

The only point, therefore, that will be presented to this court is whether there was or was not such evidence of injury and resulting damage as would

warrant the trial court to submit the case to the jury or enter judgment upon the verdict.

Errors Assigned and Relied Upon for Reversal.

First Error Assigned.

The court erred in denying the defendant's motion for a directed verdict.

Second Error Assigned.

The court erred in instructing the jury as follows:

> "If your verdict should be for the plaintiff it should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money. * * * If you allow damages, the sum allowed must be limited to such sum as is the fair market value of the personal property which you may find from the evidence has been *lost destroyed.* Plaintiff alleges that his loss in that regard is $3,020. If you find for the plaintiff you will be determining from the evidence what articles were lost, and if any such were lost, then the value thereof."

Argument.

The motion to direct a verdict was based upon several counts, one of which, only, will be urged here, which was that there was not evidence of injury or damage upon which the jury could base a

verdict for damages. This same point was also made by an exception taken to the portion of the court's charge referred to in the Second Error Assigned. The exception so taken being as follows:

> "Defendant objects and excepts to that portion of the charge relating to the amount that could be assessed, or the measure of damages, as there is no evidence that will enable the jury to determine the market value of the articles of property which it is claimed were lost or destroyed, the evidence on this question being wholly lacking, and in other respects insufficient to enable the jury to assess any damages or arrive at the question of market value."

It will be noted that no special fault is found with the charge of the court, except that there was no evidence on which to base it. Both errors assigned, therefore, relate to the single point that there was no evidence upon which the jury could calculate the damage done or find the market value of the property alleged to have been either injured or destroyed. The same point having been raised, first, by a motion to direct a verdict, and second, by exception taken to the charge.

All the evidence relating either to the injury sustained or damage done or value of the property alleged to have been either injured or destroyed was the evidence of the plaintiff, Larson, and was as follows:

> "Q. What was in the house, John, in the way of furniture?
>
> A. Furniture was in there.
>
> Q. Have you got a list of the stuff you had in there?

A. Yes.

Q. All right, you may use that list and tell us what was in there.

A. One range stove, hot water connection, $70.00.

The COURT. If he has a list of it, just submit the list.

Q. Have you a list there?

A. Yes.

Q. Is that a true statement, what you have got there, of what was in the house?

A. Yes.

Q. On the day of the slide?

A. Yes.

Q. Who did that property belong to that was in the house there?

Mr. HELLENTHAL. That is the personal property.

Mr. RODEN. The personal property, yes—who did that belong to?

A. It belongs to me.

Mr. RODEN. It belonged to you. All right. We desire to introduce in evidence this list of personal property that was upon the premises.

The COURT. It is attached to the complaint?

Mr. RODEN. No, your Honor, but I understand counsel asked for a bill of particulars and that is a bill of particulars. (34)

Mr. HELLENTHAL. It goes in evidence only to the extent of being an enumeration of the property. The list also contains the valuation of each article—we do not object to that, of course.

The COURT. Fix the valuation so the whole thing may go in, Mr. Roden.

Mr. RODEN. What is the total value of the property, do you know, John?

A. I cannot say.

Q. That is the total there, I guess.

A. $3031.00."

Whereupon, said bill of particulars was received in evidence, marked Plaintiff's Exhibit "O" and is in form and figures, as follows, to wit:

PLAINTIFF'S EXHIBIT "O".

"In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949-A.

John Larson,
Plaintiff,

vs.

Alaska Juneau Gold Mining Company (a corporation),
Defendant.

Bill of Particulars.

Comes now the plaintiff above named and, in response to the request for a bill of particular items of personal property claimed by him in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant, submits the following: (35)

Bill of Particulars.

1	range, hot-water connections	$ 70.00
1	range	60.00
3	heaters	31.00
3	full size bedsteads and bedding	210.00
7	three-quarter size bedsteads and bedding	420.00
5	dressers or bureaus	75.00
1	dresser or bureau	20.00
4	center tables	16.00
1	kitchen table	10.00
5	kitchen chairs	13.50
19	chairs	57.00
1	rocking chair	7.00

1 rocking chair	10.00
1 couch	16.00
1 couch	14.00
Cooking utensils	15.00
Plated dishes, etc	25.00
1 doz. silver plated teaspoons	6.00
½ doz. tablespoons, silver plated	6.00
½ doz. each of knives and forks, silver plated	10.00
1 wool carpet	50.00
1 sewing machine	50.00
1 wool and cotton carpet	30.00
1 trunk	20.00
Fishing gear, including 2 herring nets	45.00
Set of carpenter tools	10.00
2 kitchen sinks, with fittings	18.00
1 porcelain toilet, complete fitted	25.00
Pipes and fittings	75.00
1 Howard watch, 14 carat gold case	90.00
1 double nugget chain for watch	52.00
1 ladies' gold watch, Waltham, 17 jewel	60.00
1 ladies' watch chain	35.00
1 ladies' short nugget chain	15.00
1 wedding ring	10.00
1 man's buckle ring	15.00
1 boy's gold ring	5.00
2 nugget pins	6.00
1 ladies' nugget brooch pin	8.50
Full brass band musical instruments	750.00
Miscellaneous house furnishings, pictures, decorations, personal toilet articles, trinkets, etc	100.00
Cash	220.00
Personal clothes for self and child	250.00
Total	$3031.00

(Signed) JOHN RUSTGARD,
Attorney for Plaintiff.

United States of America,
Territory of Alaska.—ss.

John Larson, being first duly sworn (36), deposes and says: That he is the plaintiff above named; that he is acquainted with the foregoing bill of particulars, and that the same is correct as he verily believes.

John Larson.

Subscribed and sworn to before me this..... day of June, 1920.

.....

Notary Public for Alaska.

My commission expires October 8, 1922.

Service of the above admitted this..... day of June, 1920."

(See Record, pages 44-45-46-47-48.)

"Q. And the property which was in the house, the furniture and the fixtures and the cash money, that is in the list that you had this morning, was the property worth what you have said it was worth in that list?

A. Yes.

Q. And that was a little over $3000.

A. Yes.

Q. How much cash money was among that?

A. $220."

(See Record, page 56.)

There was no direct evidence that any of the articles of personal property above referred to were either injured or destroyed, unless this may be inferred from the fact that the house in which these articles of property were contained, was destroyed by the slide. Even if it should be said that this were some evidence which would tend to show that the property might have been injured or damaged, it

would certainly not tend to establish its total loss or destruction.

A more complete lack of evidence, however, is encountered when we come to consider the evidence upon which the jury were supposed to rely in calculating the amount of the damages.

Prior to the trial, and while the issues were being made up, a demand was made for a bill of particulars setting forth the items of property destroyed or injured. This bill of particulars was furnished. Upon the trial this bill of particulars was offered and received in evidence. Before it was offered, the plaintiff testified that the list containing the bill of particulars was a true statement of what was in the house on the day of the slide and that the property enumerated belonged to him.

No evidence was given relating to the value of the property, except the following:

> "Mr. Roden. Q. What is the total value of the property, do you know, John?
> A. I cannot say.
> Q. That is the total there, I guess.
> A. $3031.00."

And after the bill of particulars was so received in evidence, the following questions were asked, to which the following answers were made:

> "Q. And the property which was in the house, the furniture and the fixtures and the cash money, that is in the list that you had this morning, was the property worth what you have said it was worth in that list?
> A. Yes.

Q. And that was a little over $3000.00.
A. Yes.
Q. How much cash money was among that?
A. $220."

No witness testified concerning the condition, quality or state of repair of a single item mentioned in the bill of particulars, either before or after the injury, if injury were inflicted. Not a single one of the items was described. No one testified as to whether the same were old or new—as far as the evidence goes, they might have been perfectly new or entirely worn out, of good quality or of very inferior quality. The list is headed by two ranges, but no one testifies as to whether these were good, bad or indifferent. A little farther on we find three full-sized beds and bedding listed at $200, seven three-quarter sized beds and bedding $420.

If these bedsteads were made of mahogany they might be worth the amount at which they are listed, or even very much more; on the other hand, if they were cheap iron bedsteads, they should be worth very much less, but no one enlightens us upon this point.

Farther on we find the item, full brass band musical instruments, $750. No witness testifies as to what these musical instruments were or what the item was supposed to contain, except the information which is contained in the words "full brass band musical instruments". Then we find the item cash $220. It would seem clear enough that cash could not very well be destroyed by a landslide. The worst that

could happen to it would be that it might be lost, but no one testifies to having made any effort to find this cash or to any other fact or facts from which it might be inferred that this cash was lost.

Clearly the plaintiff in error could not prove that the items listed were not worth the amounts at which they were listed. No witness could be called, for instance, to say the range was not worth $70. Some ranges are undoubtedly worth that much or more and others very much less. And what is true of the first item, the range, is true of every other item on the list.

If this were to be considered evidence, then the defendant in the action brought to recover for a loss or injury to property would be entirely helpless. The plaintiff could file his list and rest, as was done in this case and that would settle the controversy as far as that particular issue was concerned.

He might, with equal propriety, file his whole complaint in evidence and then claim that there was evidence of all the allegations set forth in the complaint. This bill of particulars is nothing more nor less than a part of the complaint.

Before the defendant in error could recover in this case it was incumbent upon him to prove that the items of property listed were entirely destroyed or if injured merely, the extent to which the same were injured. This done, it was incumbent upon him to prove what the market value was of the things totally destroyed at the time of their destruc-

tion and in case of such articles as were only injured, to prove the market value prior to the time of the injury and the market value after the injury was received.

In addition to this he would be called upon to show just what each item of property consisted of, its state of repair or preservation and produce such other evidence, descriptive of each article as would enable the jury to determine whether the thing lost or injured was identical with the thing concerning which evidence of market value was adduced. The measure of damages in the case of property lost or destroyed being its market value at the time of its loss or destruction, together with interest thereon and in case of property injured, the difference between the market value before the injury and the market value after the injury, together with interest thereon.

If any of the property destroyed or injured were of a character that it had no market value, then it would be incumbent upon the party suing for its loss or injury to establish that fact with competent evidence, then to proceed to show its exact condition before and after the injury so that the jury would be able to say just what the loss or injury consisted of and the other side would be able to meet the claim presented and then produce evidence of the cost of the article, the cost of repair, the age of the article, evidence upon the extent to which it had been worn, or the extent to which it

had depreciated, caused through wear or age, evidence of the amount for which similar articles could be replaced and other like evidence touching the question of value, to enable the jury to assess the damage.

This character of evidence would only be competent in this case where the article lost or destroyed had no market value, and not then, unless that fact was affirmatively made to appear by evidence.

In the case at bar, there was no direct evidence that the property was either injured or lost. There was no evidence whatever descriptive of the property, no evidence tending to show its character or condition prior to the slide, no evidence from which any one could determine its value or lack of value, no evidence of its market value, no evidence that it had no market value, no evidence for which the property could be bought, no evidence for what it could be sold. The only thing done or attempted to be done was to file in evidence a bill of particulars; one of the complaints in the case, and then have the plaintiff himself testify that the articles were worth the amount at which they were listed in the bill of particulars. Clearly, this is not evidence of market value or of value at all.

The point that in the case such as the one under discussion, the market value of the property lost, together with interest thereon, is the measure of damages, and the law relating to the manner in which the market value must be arrived at, has often been passed upon by the courts.

In the case of Watson et al.. v. Longhram, 38 S. E. page 82, the action was brought to recover damages for the loss of jewelry which the plaintiff alleged was stolen from her while the plaintiff was a guest of the hotel kept by the defendants. There was a verdict for the plaintiff, and a motion for a new trial having been denied, the defendants appealed. In passing upon the point under discussion, the court, in the course of the opinion, say:

> "While in our opinion, the evidence demanded a finding that the defendants were liable, we do not think there was sufficient proof of the market value of the property lost to authorize the verdict rendered by the jury. The measure of plaintiff's recovery was the market value of the property at the time it was lost, to which interest could have been added and included in the total sum of damages allowed. In Oliquot v. Champagne, 3 Wall.—114 18 L. Ed. 116, the trial judge charged the jury as follows. 'The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale! The price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the regular course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard'. This charge was approved by the Supreme Court of the United States. The plaintiff in her petition set out a list of the goods alleged to have been lost, with the value of each. The verdict was the exact valuation of the jewels alleged in the petition. The only evidence as to the value of some of them was the price at which they had been purchased and some of the most valuable of them had been pur-

> chased many years prior to the loss. While the cost of property may be considered, in connection with other facts, in determining its value, evidence of the cost; without which is not sufficient proof of its market value. In arriving at the amount of their verdict, the jury was clearly controlled by the price paid for some of these jewels, and not by their market value at the time when the loss occurred, and although the evidence on the plaintiff showed that the market value of a pair of bracelets at the time of the loss was ten per cent less than the price paid for them, which was $1,600.00, the jury evidently estimated their value at the purchase price. As the evidence failed to definitely show the market value of the property at the time the loss occurred, a new trial must be granted."

In the case of Carmen v. Montana Cent. Ry. Co. (Mont.), 79 Pac. 690, the question now under discussion arose before the Supreme Court of Montana. This was an action for damages resulting from the wrongful killing and injuring of cattle. One of the questions before the court was whether there was evidence of damages to justify the verdict. In passing upon that question the Supreme Court of Montana said:

> "But again, there is no competent testimony in the record as to the amount of damages sustained by plaintiff. Three animals were killed, and three injured, one of which afterward died. Plaintiff was the only witness upon the question of damages, and he failed to testify directly or clearly as to the amount of his damages. He was not asked as to the amount of his damages, but simply as to the value of the animals killed and injured. He does not give the damages he sustained to the cattle which were injured and not killed, and his testimony as to the value of

the cattle killed is also very indefinite, as shown by the following questions and answers:

'Q. What would you place the value of those animals—taking all those that were injured or killed, what would you place the damage at—the value?

A. I wouldn't have sold them for near the amount of money I put them in for.

Q. Well, $240.00?

A. I wouldn't take that for them no day in the week.

Q. Well, tell the jury what they were worth, so we can get the testimony.

A. They were worth to me probably more than they would be to most anyone else, because I had only a small herd, and I was trying to grade them up to get as good a herd as I could, but I put them in for $250.

Q. Were they worth that to anybody?

A. Yes; that's my opinion.'

Plaintiff's damages for the cattle which were killed would have been their market value at the time of the killing, with interest thereon, but his damages for the cattle injured could not be fixed by the same rule. We do not think this testimony was sufficient to go to the jury at all. The burden was upon plaintiff to show with reasonable certainty what loss he had sustained, and to show that amount as definitely as possible. Mining Co. v. Freckleton (Utah) 74 Pac. 652. It left the matter of the amount of damages sustained by plaintiff entirely to conjecture by the jury, and no verdict for the amount rendered could be sustained, which had been arrived at upon this testimony. The amount of damages which plaintiff is entitled to recover should not be left to conjecture."

To the same effect are the following cases:

Schwartz v. Schendel, 53 N. W. Supplement 829;

Wagner v. Conway et al., 78 N. Y. Supp. 420;
Glass v. Hauser, 78 N. Y. Supp. 830;
Connolly v. Interurban St. Ry. Co., 86 N. Y. Supp. 213;
Brooke v. Cunard S. S. Co. Lim., 93 N. Y. S. 369;
Lee et al. v. Callahan, 84 N. Y. Supp. 167;
Whitmark v. Lorton, 8 New York Supp. 480;
St. Louis Southwestern Ry. Co. v. Miss., 84 S. E. 281;
St. Louis I. M. & S. Ry. Co. v. Law, 57 S. W. 259;
McGillivray v. Hampton, 179 Pacific 733;
Johnson v. Levy (Cal.), 86 Pac. 810;
Hatch Bros. Co. v. Black et al. (No. 884), 165 Pac. Reporter page 520;
Warshawsky et al v. Dry Dock E. B. & B. Co., 86 N. Y. Supp. 748;
Hays v. Windsor, 62 Pac. 395 (Cal.)

So, also, in the case of Boland v. Balaine, 266 Federal 22, it was held by this court that speculative and visionary estimates of value did not constitute a measure of basis for damages.

We respectfully submit that for the reasons stated the judgment should be reversed.

Dated, Juneau, Alaska,
February 1, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
Attorneys for the Plaintiff in Error.